IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DAVID CORRADO, a single man, Plaintiff/Appellant, v. CLARENCE DUPNIK, Pima County Sheriff; JEFFREY PALMER and JANE DOE PALMER, husband and wife, Defendants/Appellees.	2 CA-CV 2006-0132 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20046822

Honorable Michael D. Alfred, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 In this personal injury negligence action, plaintiff/appellant David Corrado appeals from the trial court's summary judgment entered in favor of defendants/appellees Clarence Dupnik, the Pima County Sheriff, and Sergeant Jeffrey Palmer, a Pima County Sheriff's Department (PCSD) employee (collectively, the county). Corrado argues the trial court erred in finding he had been a joint employee of the Tucson Police Department (TPD) and PCSD under A.R.S. § 23-1022(D) at the time he was injured. Finding no error, we affirm.

BACKGROUND

¶2 On appeal from a summary judgment, "we view all facts and reasonable inferences therefrom in the light most favorable to the party against whom judgment was entered." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 2, 965 P.2d 47, 49 (App. 1998). Corrado, a TPD officer, was injured during a law enforcement training exercise in April 2004. The training exercise was part of the Advance Undercover Narcotic Investigation School conducted by the Tucson Metropolitan and Pima County Counter Narcotics Alliance (CNA), previously known as the Metropolitan Area Narcotics Trafficking Interdiction Squad (MANTIS).[1]

[1]At the time of Corrado's injury in 2004, CNA had been formed and the participating agencies had "operationally" adopted the principles of CNA but were still operating under the MANTIS intergovernmental agreement "until each of the jurisdictions involved . . . had a chance to present [the new agreement] to its individual political body for approval." Both the MANTIS and CNA agreements, however, contained identical terms regarding workers' compensation coverage.

¶3 CNA, like its predecessor MANTIS, operated under an intergovernmental agreement (IGA) between TPD, Pima County, and various other governmental agencies. The IGA provides in pertinent part:

> For the purpose of workmen's compensation, an employee of a party to this agreement, who works under the jurisdiction or control of, or who works within the jurisdictional boundaries of another party pursuant to this particular intergovernmental agreement for mutual aid in law enforcement, shall be deemed to be an employee of the party who is his primary employer and of the party under whose jurisdiction and control he is then working as provided in A.R.S. Section 23-1022(D) and the primary employer party of such an employee shall be soley [sic] liable for payment of worker's compensation benefits for the purpose of this section.

That provision mirrors the statutory language found in § 23-1022(D).

¶4 On the day of the accident, Corrado was not yet assigned to CNA but was on a list of those to be assigned in a few months; therefore, he was invited by CNA to participate in the training. During a Special Weapons and Tactics (SWAT) team demonstration, Corrado volunteered to act as a hostage taker in a car on which the team was to demonstrate an assault for purposes of rescuing undercover officers in the car. As part of the demonstration, Sergeant Palmer, the "team leader" of the PCSD SWAT team, was designated to throw a "flash bang device" in front of the car as a diversionary tactic while the SWAT team rushed the car from the rear. Palmer averred that when he threw the device, it accidentally hit the side mirror of the car and "bounced inside the vehicle, apparently going off somewhere near Corrado's head." As a result, Corrado suffered permanent partial

hearing loss and migraine headaches. Corrado received workers' compensation benefits from the City of Tucson for his injury.

¶5 Corrado then filed this action, alleging Palmer had acted negligently in using the flash bang device. The county moved for summary judgment, arguing that at the time of his injury Corrado "was a joint employee of both the City of Tucson and Pima County for workmen's compensation purposes pursuant to A.R.S. § 23-1022(D)" and, therefore, "his lawsuit against Pima County [was] barred by the exclusive remedy provisions of the Workmen's Compensation Act." The trial court initially denied the county's motion, finding that because Corrado had not yet been assigned to CNA, he had not been working under the county's "jurisdiction or control" at the time of the injury, which rendered § 23-1022(D) inapplicable.

¶6 Several months later, the county moved for reconsideration of that ruling based on this court's decision in *Callan v. Bernini*, 213 Ariz. 257, 141 P.3d 737 (App. 2006). The trial court found this case "close enough [to the facts of *Callan*] to come within its scope and holding," granted the county's motion, and entered summary judgment in its favor. This appeal followed.

DISCUSSION

¶7 Corrado contends he "was not a joint employee of the City of Tucson and Pima County at the time of his accident" so this action is not barred by the exclusive remedy provision of the workers' compensation statute. Thus, he maintains, the trial court erred in

granting summary judgment in the county's favor. "On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell*, 192 Ariz. 313, ¶ 8, 965 P.2d at 50. Likewise, we review "issues involving statutory interpretation," including the application of § 23-1022, de novo. *Id.; see also Callan*, 213 Ariz. 257, ¶ 9, 141 P.3d at 739.

I. Working "under the jurisdiction or control"

¶8 By statute in Arizona, workers' compensation recovery "is the exclusive remedy against the employer or any co-employee acting in the scope of his employment" for an injured employee unless "the injury is caused by the employer's [or co-employee's] wilful misconduct." § 23-1022(A). With respect to public employees, § 23-1022(D) provides:

> An employee of a public agency . . . who works under the jurisdiction or control of or within the jurisdictional boundaries of another public agency pursuant to a specific intergovernmental agreement or contract entered into between the public agencies . . . is deemed to be an employee of both public agencies for the purposes of this section. The primary employer shall be solely liable for the payment of workers' compensation benefits for the purposes of this section.

¶9 Corrado does not allege that Palmer engaged in "wilful misconduct." And it is undisputed that at the time of the accident both Corrado and Palmer were employees of public agencies and that those agencies were parties to a specific IGA. Thus, whether workers' compensation is Corrado's exclusive remedy turns on the question of whether he

was "work[ing] under the jurisdiction or control of" the county pursuant to an IGA when he was injured. § 23-1022(D).

¶10 "'[W]hen the question is whether a worker's common law rights should be denied him, it is . . . appropriate to interpret strictly the workers' compensation statutes.'" *Mitchell v. Gamble*, 207 Ariz. 364, ¶ 22, 86 P.3d 944, 951 (App. 2004), *quoting Bonner v. Minico, Inc.*, 159 Ariz. 246, 256, 766 P.2d 598, 608 (1988); *see also Young v. Envtl. Air Prods.*, 136 Ariz. 158, 163, 665 P.2d 40, 45 (1983). This is consistent with the general principle that we are to strictly construe statutes that limit common law liability so as to "'"avoid any overbroad statutory interpretation that would give unintended immunity and take away a right of action."'" *Andresano v. County of Pima*, 213 Ariz. 65, ¶ 6, 138 P.3d 1192, 1194 (App. 2006), *quoting Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 5, 71 P.3d 359, 361 (App. 2003), *quoting Smith v. Ariz. Bd. of Regents*, 195 Ariz. 214, ¶ 9, 986 P.2d 247, 249 (App. 1999). Ultimately, in interpreting any statute, "[t]he primary rule of statutory construction is to find and give effect to legislative intent." *Mail Boxes, Etc., U.S.A. v. Indus. Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995); *see also Callan*, 213 Ariz. 257, ¶ 11, 141 P.3d at 740.

¶11 This court recently discussed the purpose and meaning of § 23-1022(D) in *Callan*, the case on which the county relied in successfully moving for reconsideration below. In that case, Luis Pimber, a University of Arizona police officer assigned to MANTIS, was injured by Robert Callan, a member of the TPD SWAT team, during a joint

operation. 213 Ariz. 257, ¶ 6, 141 P.3d at 738-39. We ruled that Callan and Pimber had been co-employees at the time of the injury and, therefore, that Pimber was limited to the exclusive remedy of workers' compensation.[2] *Id*. ¶ 33. We also found the language of § 23-1022(D) unambiguous and applicable "to employees of public agencies that have entered into a specific intergovernmental agreement." 213 Ariz. 257, ¶ 12, 141 P.3d at 740. In addition, we noted that the legislature had added subsection (D) to § 23-1022 "in response to this court's decision in *Garcia v. City of South Tucson*, 131 Ariz. 315, 640 P.2d 1117 (App. 1981)" and had intended thereby "to limit" "lawsuits arising from injuries officers sustain" in joint police operations. *Callan*, 213 Ariz. 257, ¶¶ 14-15, 141 P.3d at 740-41.

¶12 With *Callan* as a backdrop, we turn to the question of whether Corrado was under the "jurisdiction or control" of the county at the time of his injury. § 23-1022(D). Neither side argues Corrado was working under the county's "jurisdiction" or "within the [county's] jurisdictional boundaries" when he was injured. § 23-1022(D). Accordingly, we instead focus on whether he was under the county's "control" at that time. *Id*. Corrado urges us to apply the "totality of the circumstances" test for "distin[guishing] between an employee and an independent contractor" as the appropriate test for "control" under § 23-1022(D). *City of Phoenix v. Indus. Comm'n*, 154 Ariz. 324, 328, 742 P.2d 825, 829 (App.

[2]As we also noted in *Callan*, "[a]lthough Callan was not assigned to MANTIS as Pimber was, he was a member of the SWAT unit that participated in the undercover operation in which Pimber was injured," thereby making them co-employees and restricting Pimber's remedy to workers' compensation benefits. 213 Ariz. 257, ¶ 33, 141 P.3d at 744.

1987); *see also Santiago v. Phoenix Newspapers, Inc.*, 164 Ariz. 505, 508-13, 794 P.2d 138, 141-46 (1990); Restatement (Second) of Agency § 220 (1958). But, in *Callan*, this court rejected "[t]hat analysis [as] not applicable . . . in light of the language of § 23-1022(D)." 213 Ariz. 257, ¶ 32, 141 P.3d at 744.

¶13 Corrado, however, argues that *Callan* is distinguishable on this point because, in that case, "[t]here was no need to engage in an analysis of whether the injured party was a joint employee or working under the control of another signatory agency. The conclusion was obvious." But our rejection of the employee-independent contractor analysis in *Callan* did not rest solely on the particular facts of that case, but rather, on "the language of § 23-1022(D)." 213 Ariz. 257, ¶ 32, 141 P.3d at 744. As noted above, that subsection provides that an employee of a public agency is a joint employee of that agency and another public agency if he or she "works under the jurisdiction or control of . . . [the other] public agency pursuant to a specific intergovernmental agreement or contract entered into between the public agencies." § 23-1022(D).

¶14 Thus, the statute itself provides the definition of a "joint employee" that we are to apply in this context. And, although the authorities on which Corrado relies discuss a putative employer's "right of control" over an employee, they do so merely as one factor in a broad, multifactor analysis used to determine the worker's role and relationship to different, alleged employers. *See Santiago*, 164 Ariz. at 508-13, 794 P.2d at 141-46; *City of Phoenix*, 154 Ariz. at 328, 742 P.2d at 829. Under § 23-1022, however, the definition

of a joint employee begins and ends with whether the public employee had worked under the jurisdiction or control of another public agency pursuant to an IGA.

¶15 The legislature has not defined the term "control" as we are to apply it in this context. But, "when a term is not specifically defined by [a] statute, it must be given its ordinary meaning." *Harrelson v. Indus. Comm'n*, 144 Ariz. 369, 374, 697 P.2d 1119, 1124 (App. 1984); *see also In re Ubaldo B.*, 206 Ariz. 543, ¶ 10, 81 P.3d 334, 337 (App. 2003) (reference to dictionary for meaning of statutory words acceptable). The term "[c]ontrol" has been defined as "the power or authority to manage, direct, or oversee" or "[t]o exercise power or influence over." *Black's Law Dictionary* 353 (8th ed. 2004); *see also Pac. Employers Ins. Co. v. Hartford Accident & Indem. Co.*, 228 F.2d 365, 368 (9th Cir. 1956) ("'The word "control" does not import an absolute or even qualified ownership. On the contrary it is synonymous with superintendence, management, or authority to direct, restrict or regulate.'"), *quoting Rose v. Union Gas & Oil Co.*, 297 F. 16, 18 (6th Cir. 1924). This definition is consistent with the legislature's intent to limit public agency liability in situations such as this that involve joint law enforcement operations. *See Callan*, 213 Ariz. 257, ¶¶ 14-15, 141 P.3d at 740-41.

¶16 In urging reversal, Corrado primarily argues he was not under the county's control pursuant to an IGA because he had not yet been assigned to CNA at the time of his injury, but was still assigned to a TPD community response team. And, he points out, a TPD officer (Sergeant Lopez) was "in overall charge of this particular school," the school was

located and the training exercise was held at a TPD facility, and Corrado was required to take his own TPD-supplied equipment to the training. Likewise, he maintains he was not under the county's control because he needed permission from TPD to attend the school, "was merely a brief volunteer during a demonstration," and was free to leave the school early. None of those facts is disputed, nor does the county contest the facts that Corrado "was a TPD employee," "was paid by TPD," "his regular sergeant was a TPD sergeant," and "Pima County had no right to hire or fire [Corrado]."

¶17 As Corrado acknowledges, however, he was injured while participating in a county SWAT team demonstration that was "controlled by PCSD" and conducted under Palmer's direction. And a county sheriff's deputy, Andrew Loza, testified in deposition, without contradiction, that during the demonstration he had acted as "the safety officer for the scenarios" and had directed Corrado and another volunteer on what they should do during the exercise. Indeed, as the county points out, there is no evidence in the record that Lopez or any other TPD officer "directed . . . how the [county] SWAT team would do its [demonstration], nor . . . that Sergeant Lopez directed Corrado in what to do in the exercise."

¶18 Thus, although Corrado had not yet been assigned to CNA at the time of the accident, it took place while he was working under the direction and oversight of the county SWAT team and its officers during an exercise held pursuant to an IGA between his employer, TPD, and the county. As in *Callan*, therefore, "the facts show the operation was

under the control" of another public agency pursuant to an IGA, and for purposes of § 23-1022(D), Corrado was a joint employee of the county and TPD at the time of his injury. 213 Ariz. 257, ¶ 19, 141 P.3d at 741.[3]

¶19 In sum, we agree with the trial court "[t]hat the instant matter, while not factually indistinguishable from . . . *Callan*, . . . come[s] within its scope and holding." Therefore, the court did not err in finding that Corrado was a joint employee under § 23-1022(D) at the time of his injury and thereby limited to the exclusive remedy of workers' compensation.[4]

II. Alleged factual disputes

¶20 Corrado also contends summary judgment was inappropriate because "[t]here is a factual dispute regarding control."[5] He maintains that, although Palmer averred that he

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[3]In his reply brief, Corrado cites A.R.S. § 23-901(6)(b) and argues for the first time that "an individual is not an employee under workers' compensation law if his employment is both (1) casual; and (2) not in the usual course of the trade, business or occupation of the employer." But arguments made for the first time in a reply brief generally are deemed waived. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005). And, in any event, Corrado neglects to address subsection (6)(a) of § 23-901, which states "[e]very person in the service of the state or a county, [or] city, . . . including regular members of lawfully constituted police . . . departments of cities and towns" are employees for purposes of workers' compensation.

[4]Although Corrado correctly notes the trial court did not expressly find that he had been "work[ing] under the jurisdiction or control of" the county at the time of the accident, § 23-1022(D), the court implicitly so ruled, and we may affirm its ruling on any basis supported by the record and the law. *See MacLean v. State Dep't of Educ.*, 195 Ariz. 235, ¶ 18, 986 P.2d 903, 908 (App. 1999).

[5]The county contends Corrado waived any argument that genuine issues of material fact exist precluding summary judgment by not so arguing below. On this record, we find

"was the S.W.A.T. team leader in charge of the exercise," TPD Captain David Neri testified in deposition that Lopez, a TPD sergeant assigned to CNA, had been "[t]he supervisor on the scene in charge of the training session." But Neri then clarified in his deposition that Lopez "was . . . in overall charge of this particular school" and had "[o]verall supervision of [the] . . . training exercise" as a whole. As Neri further testified, "[T]he actual practical aspect of [the exercise] . . . [was] at the discretion of the SWAT agency."

¶21 The conflict here, therefore, is not a genuine factual dispute about who had command on the day of the incident—the record shows Lopez was in charge of the overall training school that day while Palmer ran the particular exercise in which Corrado was injured. In other words, we are not faced with disputed facts but, rather, with a dispute about the legal conclusions to be drawn from the uncontroverted facts on the issue of "control." Absent any genuine issue of material fact, the trial court properly decided that question as a matter of law and did not err in granting summary judgment in favor of the county. *See* Ariz. R. Civ. P. 56(c), 16 A.R.S., Pt. 2; *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 432, 880 P.2d 648, 652 (App. 1993) ("A grant of summary judgment is appropriate when the trial court finds no material facts in dispute and

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no such waiver. And, in any event, this court must independently determine whether a genuine issue of material fact exists, and if one does exist, we may not affirm a summary judgment even when a party has failed to respond to the motion below. *See Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 15, 83 P.3d 56, 59-60 (App. 2004); *but cf. Napier v. Bertram*, 191 Ariz. 238, ¶ 6, 954 P.2d 1389, 1390 (1998) ("Ordinarily, courts should not consider new factual theories raised for the first time on appeal from summary judgment . . . .").

the moving party is entitled to judgment as a matter of law."); *cf. Wiseman v. DynAir Tech of Ariz., Inc.*, 192 Ariz. 413, ¶ 10, 966 P.2d 1017, 1020 (App. 1998) ("Where the facts of employment are undisputed, the existence of an employment relationship is a matter of law.").

DISPOSITION

¶22 The judgment of the trial court is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge